

In the Matter of:

US v. Rafiekian

June 28, 2019



Phone: 703-837-0076
Fax: 703-837-8118
Toll Free: 877-837-0077

1010 Cameron Street
Alexandria, VA 22310
transcript@casamo.com

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

(Alexandria Division)

UNITED STATES OF AMERICA,

Plaintiff,

v. No. 1:18-CR-457 (AJT)

BIJAN RAFIEKIAN,

a/k/a "Bijan Kian,"

and

KAMIL EKIM ALPTEKIN,

Defendants.

June 28, 2019

The above-entitled matter came on to be
heard before the HONORABLE ANTHONY J. TRENGA, Judge
in and for the United States District Court for the
Eastern District of Virginia, located at 401
Courthouse Square, Alexandria, Virginia, commencing
at 10:31 a.m., before Rebecca Monroe, RPR, when were
present on behalf of the respective parties:

1 A P P E A R A N C E S

2

3 ON BEHALF OF THE PLAINTIFF:

4 JAMES PHILIP GILLIS, ESQUIRE

5 EVAN N. TURGEON, ESQUIRE

6 JOHN T. GIBBS, ESQUIRE

7 KATIE SWEETEN, ESQUIRE

8 United States Attorney's Office

9 Eastern District of Virginia

10 2100 Jamieson Avenue

11 Alexandria, Virginia 22314

12 (703) 299-3700

13

14 ON BEHALF OF THE DEFENDANT BIJAN RAFIEKIAN:

15 STACEY H. MITCHELL, ESQUIRE

16 JAMES TYSEE, ESQUIRE

17 ADAM A. BERESTON, ESQUIRE

18 SAMANTHA J. BLOCKS, ESQUIRE

19 Akin, Gump, Strauss, Hauer & Feld, LLP

20 1333 New Hampshire Avenue, Northwest

21 Washington, D.C. 20036

22 (202) 887-4510

1 P R O C E E D I N G S

2 - - - - -

3 THE CLERK: Criminal Case Number
4 1:18-cr-457. United States versus Bijan Rafiekian.
5 Counsel, will you please note your appearances for
6 the record.

7 MR. GILLIS: Good morning, Your Honor. Jim
8 Gillis, Evan Turgeon, John Gibbs, and Katie Sweeten
9 for the United States.

10 THE COURT: Welcome.

11 MS. MITCHELL: Good morning, Your Honor.
12 Stacey Mitchell. James Tysse is joining me this
13 morning for the first time appearing in this matter,
14 as well as Adam Bereston and Samantha Block.
15 Mr. MacDougall and Trout had previously scheduled
16 plans and are not going to join us today.

17 THE COURT: All right. We are here on the
18 defendant's motion to dismiss -- dismiss the
19 indictment which I've -- which I've reviewed. I'd
20 be pleased to hear further -- further from counsel.

21 MR. TYSSE: Good morning, Your Honor.

22 THE COURT: Good morning.

1 MR. TYSSE: My name is James Tysse, I'm
2 appearing on behalf of the defendant. The
3 government's indictment against my client is
4 defective and should be dismissed. With respect to
5 Count 2, my client's position is that the legal
6 commercial transaction language is part of the
7 offense because it's what separates the illegal --

8 THE COURT: Isn't there a distinction
9 between whether it's a -- needs to be pled as a
10 separate element and whether or not it be -- it's
11 part of the Government's substantive burden of
12 proof?

13 MR. TYSSE: There is a distinction between
14 that, Your Honor.

15 THE COURT: Right.

16 MR. TYSSE: There is some defenses.

17 THE COURT: You're claiming that it really
18 is both. You're saying that not only does the
19 Government have the burden of proving that the
20 defendant was engaged in something other than a
21 lawfully commercial transaction, that has to be pled
22 as a separate -- a separate element --

1 MR. TYSSE: That's --

2 THE COURT: -- and that simply alleging
3 that he acted as an agent, which is a defined term,
4 isn't a sufficient pleading.

5 MS. MITCHELL: That's right, Your Honor.
6 There is a distinction between that. In fact, some
7 affirmative defenses will require the Government to
8 still bear that burden, but our point is that it is
9 actually part of the offense. It's what separates
10 the illegal from the innocent conduct.

11 And the Government's position is the
12 opposite, that Section 951 makes it presumptively
13 illegal to act on behalf of a foreign government
14 without registering in all circumstances and that
15 the burden then shifts to us to essentially prove
16 that the conduct was legal. And we haven't gotten
17 to what that burden necessarily would be, but that
18 is their position, they have not denied that.

19 And I want to make two principle points
20 about why they can't be right. And the first is
21 that can't be squared with the way that the statute
22 is actually written. And I want to be very precise

1 about why we think our position on the statutory
2 text is right and not the Government's. And it's at
3 Section 951(A), if you read it carefully, prescribes
4 not acting at the direction or control of a foreign
5 government but, rather, acting as an unregistered
6 agent of a foreign government; and that is a defined
7 term.

8 It's defined in Subsection D. And
9 Subsection D defines that term in the same sentence
10 as having relevant here -- relevant here in two
11 different components. The first one is that you had
12 to have agreed to operate under a foreign
13 government's direction or control. And, two, that
14 you could not have engaged in a mere commercial
15 transaction. There are other elements as well, but
16 those are the -- those are the key ones we're
17 focusing on.

18 And that's a crucial element because it's
19 actually defining part of the definitional sentence
20 that's embedded in 951(A). It is not a situation
21 where 951(A) says anyone who acts in the direction
22 or control of a foreign government is liable for up

1 to ten years imprisonment and subsection D says the
2 following people are exempt from this provision. It
3 doesn't do that. It says agents of a foreign
4 government are -- who are guilty under the statute
5 and then it defines it to specifically exclude
6 anyone engaged in a legal commercial transaction.
7 So the Government therefore must allege both and
8 prove both ultimately at trial.

9 That's the first point. The other -- or
10 second point is that, you know -- and I think Your
11 Honor's question earlier alluded to this point to
12 some extent, but, you know, we feel strongly that
13 this is the Government's burden to actually allege
14 and prove this point and, in fact, it should not be,
15 we don't think, a difficult burden or especially
16 onerous one for Government to explain what the
17 illegal noncommercial activity they think is the
18 crux of the offense is.

19 But, regardless, the Government still in
20 this case, in our view, has not alleged any actions
21 taken at Turkey's direction and control that are
22 inconsistent with that legal commercial transaction

1 language. And, in fact, the Government appears to
2 concede that the core agency allegations, the scope
3 of the activity that my client was allegedly doing
4 on behalf of Turkey -- he denies that, but that's
5 the allegation in the complaint we take as true,
6 specifically the lobbying activities and the
7 publication of the op-ed. The Government does
8 not -- appears to concede by not disputing that
9 those are, in fact, both legal activities protected
10 by the First Amendment and that they're commercial
11 ones.

12 So in that respect, my client has no notice
13 of what he has done on behalf -- allegedly on behalf
14 of Turkey that is not a legal commercial transaction
15 and, as importantly, would have no way of proving or
16 putting evidence on trial that, in fact, his
17 activities were legal, if he doesn't even understand
18 what the Government's allegations are regarding what
19 makes those illegal.

20 And, you know, I just think that is not the
21 way this is supposed to work, Your Honor, in a
22 situation where part of the offense element asks

1 whether -- or, you know, specifies that there's no
2 crime if we were just engaged in a mere legal
3 commercial transaction. It should be incumbent upon
4 the Government in the first instance to come forward
5 and explain exactly what makes it illegal.

6 And I can point you, Your Honor -- I think
7 this is helpful -- point you to the language of the
8 Department of Justice's own regulation, which is in
9 28 CFR 73.1(f), and it does not define legal
10 commercial transaction in a particularly narrow way.
11 I think, on the contrary, it is exceedingly
12 expansive language.

13 It says for the 951(D)(4), the provision
14 we're talking about, legal commercial transaction
15 means any exchange, transfer, purchase, or sale of
16 any commodity, service, or property of any kind --
17 that's three anys so far -- including information or
18 intellectual property not prohibited by federal or
19 state legislation or implementing regulations.

20 Now, again, it seems to me, Your Honor,
21 that in a situation where the Government is putting
22 my client on trial, facing up to ten years

1 imprisonment, and the Government acknowledges
2 there's no notification requirement if we're engaged
3 in any sort of legal transaction, again, those three
4 anys, and the -- whether it's legal or not is
5 whether it's prohibited by federal or state
6 legislation or regulation.

7 Seems like it's not a hard burden for the
8 Government to come forward and say here's what you
9 did that violates a particular federal legislation,
10 here's what you did that violates some state
11 legislation, here's what you did that violates some
12 implemented regulations.

13 Because, otherwise, we're going to go to
14 trial in this case and the Government says it's our
15 burden to come forward with evidence and potentially
16 prove by a preponderance of the evidence -- again,
17 we have not established that yet, but potentially
18 prove by a preponderance of the evidence that we did
19 not engage -- we did not commit any illegal acts, we
20 didn't commit any acts that were not, you know, in
21 violation of federal or state legislation or
22 regulations, I just think that inverts the typical,

1 you know, burden that you find in a case like this.

2 And for that reason it should be the
3 Government's burden and not ours to come forward
4 with that sort of evidence.

5 THE COURT: All right.

6 MR. TYSSE: Now, I'm happy to answer any
7 particular questions the Government or Your Honor
8 has, excuse me, but otherwise I was -- you know, I
9 would like to make a few more points about just this
10 general -- this general scheme and why we think --

11 THE COURT: All right.

12 MR. TYSSE: -- our position is right.

13 Okay. Great. So -- and, again, I think
14 I've already explained the statutory interpretation
15 point and why we don't think this is -- why we think
16 this must be an offense element, unlike the cases
17 the Government cites for the most part. They are
18 all defining or they're all describing sort of
19 defenses that excuse liability, and here there's not
20 a question of excusing liability.

21 Again, we're not an agent of a foreign
22 government at all unless we're not engaged in merely

1 commercial transactions. I think the Royal case
2 that the Government cites, I think, even -- even
3 alludes to this point that uses a situation -- or in
4 that case, the Government made clear -- or, excuse
5 me, the Fourth Circuit made clear that when a linked
6 definitional provision is linked to the offense
7 conduct itself, you're supposed to import that --
8 that linked definitional sentence into the offense
9 conduct.

10 So in that case it was -- you had -- the
11 Government had to allege and ultimately prove at
12 trial that it was in -- the ammunition was designed
13 for use in any firearm. That was in a separate
14 provision, but the Fourth Circuit said we import
15 that in because you're importing in the definitional
16 sentence because it's part and parcel of the offense
17 itself. And it's the same -- same principle here.

18 I already talked about how it's not a
19 narrow exception. Also I think the purpose in
20 history, which I don't think is -- is seriously in
21 dispute in this case, was that Congress wanted to
22 significantly narrow the offense. It used to be

1 quite broad, it used the common law definition of
2 agency and that's what the Fourth Circuit said in
3 the 1980 case. I can't quite pronounce it, so I'm
4 not going to try to, but the 1980 case talking about
5 Section 951, it actually said, you know, that used
6 the common law definition of agency and the Court
7 said everyone knows what an agent is.

8 But Congress in 1983 said that's too broad,
9 it's potentially vague, the State Department doesn't
10 like it, DOJ doesn't like it, some courts have asked
11 questions about it, so let's narrow it and have
12 fewer people register. Let's exclude those people
13 from the obligation to register in the first place.

14 And so in that circumstance, then the
15 question becomes was Congress doing that to say
16 everyone is still guilty but you can prove at trial
17 that you didn't have to register as an affirmative
18 defense or was it simply excluding from the -- the
19 offense all together; and I think it -- it must be
20 the latter.

21 Also, on the history point, I don't think
22 the facts are in the possession of my client.

1 Again, for the same reason I just mentioned, the
2 facts of what regulation or state or federal
3 implementing law that we might have violated are not
4 in our possession. They're at least -- they're in
5 the Government's possession. They're the ones
6 alleging that we did not engage in a legal
7 commercial transaction.

8 So I don't -- I don't think that factor, in
9 terms of the balance of what's an affirmative
10 defense versus what's an element, really weighs in
11 the Government's favor at all.

12 Finally, since, you know, the question
13 about this or confusion, I think the Constitution
14 avoidance canon would support requiring the
15 Government to allege this as an element in this
16 case. And, you know, I think we've alleged a
17 number -- or pointed out a number of different
18 Constitutional provisions that are implicated in
19 this case and the Government has not really disputed
20 them.

21 The First -- First Amendment. We've
22 mentioned how this implicates the First Amendment in

1 several ways. The core activities alleged, the
2 agency allegations are writing an op-ed and lobbying
3 the Government, those things are written in the
4 First Amendment.

5 The -- and there's also Fifth Amendment
6 concerns with making sure a grand jury has -- is
7 actually charging a crime, seeing all the elements
8 of a crime. And the Sixth Amendment, just getting
9 notice of what the crime is. They're all
10 implicated. So I think to the extent there's any
11 doubt about what the Congress must have intended, it
12 would be wise for the statute to be read as actually
13 requiring this as an element.

14 And I want to make one other point too,
15 Your Honor, which is that Government mentions or
16 alludes to the idea that this is somehow a technical
17 defense that we're making. And I want to be very
18 clear about this because I do think it is a
19 technical defect in the sense that they should have
20 to actually allege, you know, potentially in haec
21 verba that this was not a legal commercial
22 transaction, just to make sure you're following the

1 statutory language.

2 I don't actually think this is a technical
3 argument at all because ultimately what is going on
4 here is the Government is saying that we engaged in
5 a number of activities that were not legal and
6 commercial in nature and their evidence that they
7 were not legal and commercial in nature is that --
8 basically three -- three points.

9 They say -- first, they use the word
10 "unlawful" in the indictment; but, obviously, just
11 saying something is unlawful does not make it so.
12 You can't say -- you know, it's an oxymoron to
13 describe something as unlawful First Amendment
14 protected activity. Okay.

15 So what's the second category. The second
16 category, they say we concealed the -- Turkey's
17 involvement, my client concealed Turkey's
18 involvement as part of the conspiracy. Now, again,
19 if it was -- if he'd engaged in legal commercial
20 activities at all times, there's nothing to conceal.
21 I mean, there's nothing wrong with concealing.
22 There's no obligation for him to tell the

1 Government, he could have concealed all he wanted
2 because there was no crime.

3 It's bootstrapping to say the illegal
4 activity here was not actually notifying the
5 Government under Section 951 because, again, that
6 would just be bootstrapping and it would eliminate
7 the legal commercial transaction language from the
8 statute because even -- even the roofer on the --
9 you know, the roof contracting -- Embassy Roof would
10 still have to register in that case because,
11 otherwise, the Government could say, well, you
12 failed to register and that's presumptively illegal.
13 So that can't be right either.

14 So the third thing is the FARA registration
15 form itself and the false statements they allege.
16 And, again, I don't think they specifically allege
17 anywhere that those statements were actually done on
18 behalf of Turkey. And so, therefore -- and I think
19 if you look at the indictment as a whole, the crux
20 of the allegations are that we engaged in writing
21 op-eds, we engaged in lobbying activity, and we're
22 doing all those things on behalf of Turkey.

1 The false statements on the FARA forms was
2 what happened at the very end when the -- after FIG
3 had dissolved, essentially, after the election and
4 Michael Flynn had become a member of the Trump
5 administration and -- and the FARA unit started
6 asking questions and they filled out these forms.

7 So, you know, if the Government is right
8 that that is the non-legal commercial activity that
9 gets us within the statute, it basically means that
10 the -- the activity that my client did at the very
11 end in order to actually, you know, inform the -- to
12 actually notify the Government was what made him an
13 agent all along which, again, I just don't think
14 makes a lot of sense in terms of it.

15 And it also doesn't make sense in terms of
16 the structure of the indictment. There's two
17 counts. The second count is a substantive count of
18 acting as an agent, which presumably encompasses all
19 of the lobbying and commercial -- or lobbying and
20 other op-ed activity.

21 And then Count 1 has the conspiracy with
22 two criminal objects. One of them is that same

1 agency activity. The other one is the false
2 statements which, again, suggest to me that, you
3 know, if they really want to go after the illegal
4 activity as the FARA filing at the very end, you
5 know, what they're really just saying is that there
6 was a conspiracy to make false statements on a FARA
7 form. So at a minimum everything should go except
8 for -- except for that count.

9 I'm happy to talk about anything else Your
10 Honor wants, but I think otherwise --

11 THE COURT: All right. Let me hear from
12 the Government.

13 MR. TYSSE: -- I think those are my main
14 points.

15 MR. TURGEON: Thank you, Your Honor.

16 THE COURT: Good morning.

17 MR. TURGEON: Good morning. We would
18 concede that we don't -- that we need to prove the
19 definition of agent in this case, of course, and we
20 need to prove that that's satisfied, but we don't
21 need to prove the absence of exceptions to that
22 definition.

1 And so the core premise that the defendant
2 is focusing on in his reply and this morning is that
3 the only Constitutional way to read Section 951 is
4 that it covers only those who, as agents of a
5 foreign Government, engage in acts that are
6 inherently wrongful; but that's just not true.

7 Courts have upheld a wide range of
8 disclosure on registration requirements related to
9 otherwise lawful conduct, even Constitutionally
10 protected conduct that the Government has a valid
11 interest in regulating or monitoring.

12 For example, possession of certain types of
13 firearms, selling securities, or even making
14 political campaign contributions. And many of those
15 registration or disclosure requirements are
16 accompanied by penalty provisions.

17 So here there's no question the Government
18 has not only a valid interest, but a strong interest
19 in requiring public disclosure by a person who's
20 acting in the United States for foreign governments,
21 particularly where their activities are political in
22 nature.

1 Moreover, even if you were to assume, as
2 the defense does, that the legal commercial
3 transaction exception is necessary to distinguish
4 wrongful or innocent from wrongful conduct, it can
5 do that even if it operates as an affirmative
6 defense rather than an element.

7 And, finally, a practical common sense
8 reading of the indictment makes clear that the
9 defendants alleged conduct is not innocent but
10 includes acts that are self-evidently wrongful.

11 THE COURT: What are those?

12 MR. TURGEON: Those include acts of
13 concealment, including criminal acts of concealment.

14 THE COURT: Which are?

15 MR. TURGEON: Which are the defendants
16 causing false statements to --

17 THE COURT: Right. I understand that piece
18 of it.

19 MR. TURGEON: -- the Department of Justice.

20 THE COURT: I understand that piece of it.

21 But is it the Government's position that the
22 lobbying and the op-ed piece were unlawful and not

1 legal commercial -- not within the definition of
2 legal commercial transactions?

3 MR. TURGEON: Your Honor, that brings me to
4 my next point, which is how we interpret the
5 definition of -- how we interpret commercial
6 transactions.

7 THE COURT: Before -- before you explain
8 your answer, just -- if you could just answer
9 directly my question; and that is, is the Government
10 contending that the op-ed -- the activities
11 pertaining to the op-ed and the lobbying, without
12 reference to the FARA filing, were something other
13 than legal commercial transactions?

14 MR. TURGEON: Yes, they were. They
15 weren't -- they were in violation of FARA, for
16 example.

17 THE COURT: How?

18 MR. TURGEON: They were political
19 activities undertaken on behalf of a foreign
20 Government without disclosure to the United States.
21 That's in violation of FARA, for example.

22 THE COURT: Well, are you contending that

1 they're not legal commercial transactions?

2 MR. TURGEON: Yes, Your Honor, they are --

3 they are not legal commercial transactions.

4 THE COURT: Again, that's what I'm having

5 trouble understanding --

6 MR. TURGEON: Well --

7 THE COURT: -- is the theory.

8 MR. TURGEON: It's important to think about
9 how -- what legal commercial transaction means, how
10 it's interpreted.

11 THE COURT: Right.

12 MR. TURGEON: I mean, the guiding principle
13 here is what Congress --

14 THE COURT: It means any -- according to
15 the -- according to the regulations, it means any --
16 any service, including the exchange of information.

17 MR. TURGEON: I mean, Your Honor, I think
18 another factor you need to look at in addition to
19 the regulations is the legislative history which
20 makes crystal clear. I mean, it says -- and the
21 defense cites legislative history, of course, but
22 they selectively and misleadingly omit this section.

1 They say that Section 951 was intended to
2 focus only on those in whom the United States
3 Government has a necessary interest. And that's
4 suggesting, of course, the defendant isn't one of
5 those people. But in both filings, they omit the
6 sentence that comes immediately before that, which
7 says the proposed act is not intended to cover those
8 individuals engaged in routine commercial matters,
9 but is intended to cover individuals who represent
10 foreign governments in political activities that may
11 or may not come within the scope of a foreign agent
12 for --

13 THE COURT: I understand that and I saw
14 that. But the political activity reference doesn't
15 find its way into the statute, does it? There's no
16 reference of political activities in the statute the
17 way the statute is structured.

18 MR. TURGEON: The statute itself?

19 THE COURT: Yes.

20 MR. TURGEON: No, Your Honor. No, and
21 that's why you need to look at -- need to look at
22 what Congress intended, and that's -- that's how --

1 how the statute is -- I think -- I think a found- --
2 something first we need to look at is whether legal
3 commercial transaction is a defense or an element.
4 And that's --

5 THE COURT: Right.

6 MR. TURGEON: That's the central question
7 here, right, in determining whether the indictment
8 was properly brought.

9 I mean, the guiding principle is what
10 Congress intended, so you look --

11 THE COURT: Well, it's a little more than
12 that, but let's proceed down that road.

13 MR. TURGEON: Well, if you look at the
14 statute, if you look at the words and structure of
15 the statute, Your Honor --

16 THE COURT: Right. And that's -- that's
17 what I'm doing. It's a convoluted statute because
18 what -- what hasn't been mentioned, really, is
19 paragraph E, which affirmatively includes people
20 engaged in legal commercial transactions under
21 certain circumstances. And so you have a statute
22 with a defined term, "agent," and then you have both

1 in an exception and an affirmative clause what it
2 means.

3 And everyone seems to agree that the
4 controlling principle was the one announced in the
5 Cook case, which is that it's an element when the
6 language defined in the prohibited conduct is so
7 incorporated with language that the ingredients of
8 the offense cannot be accurately and clearly
9 described if the exceptions are omitted. Here you
10 have a very convoluted statute with -- with a number
11 of points, all of which go to the scope of the
12 statute, which is who is an agent.

13 Only agents are -- only agents are covered
14 by the statute. It's not as if all persons are
15 covered and then you have exceptions. You have a
16 defined term, agent. It could -- it could have
17 called it, you know, Xs or Ys. And so the question
18 is what does the Government have to prove that the
19 person being prosecuted is a -- as an X is an X.

20 MR. TURGEON: Your Honor, as you point out,
21 Subsection E is an exception to the exception.

22 THE COURT: Yeah, but it's an affirmative

1 statement. It says any person engaged in legal
2 commercial transaction shall be considered an agent
3 under certain circumstances. And I don't think the
4 Government's contending that that -- that applies
5 here.

6 MR. TURGEON: No, Your Honor.

7 THE COURT: Correct.

8 MR. GILLIS: No, we -- we don't believe
9 that's an issue at all. I mean, I don't think that
10 changes the analysis -- the analysis under both Cook
11 and McKelvey as to whether the legal commercial
12 transaction exception is a defense or an element. I
13 mean, and those two cases compel -- compel finding
14 that it is not an element of the offense.

15 I mean, in Cook and McKelvey the Supreme
16 Court said that there are two factors for a Court to
17 consider to determine whether language refers to an
18 element or a defense, and both of those factors here
19 support the Government's position.

20 The first factor is the placement of the
21 language. This is from McKelvey, is it separate or
22 set off with commas. Here the exception is set off

1 in another subsection entirely, it's part of the
2 definition of agent. And that supports the
3 conclusion that it's a defense, not an element.

4 And second -- the second factor is how the
5 statute reads if you omit that language, as Your
6 Honor pointed out. Here, that factor compels the
7 finding that it's a defense. It's not even in
8 Subsection A.

9 In the nearly 100 years since McKelvey was
10 decided, this two-factor test, Cook and McKelvey,
11 has been the well settled rule on the element versus
12 defense question. And Congress knew when it enacted
13 Section 951 in 1948 and when it amended it in 1984
14 that this was how the Courts would interpret their
15 statutory language.

16 And so Mr. Tysse brought up Royal and,
17 aside from Duran which is directly on point, I think
18 Royal is the most analogous case to ours because it
19 similarly defines exceptions to a definition.

20 THE COURT: Tell me again, let me try one
21 more time, why what's been alleged as to the op-ed
22 and the -- and the lobbying is -- is not within the

1 definition or within the regulations definition of a
2 legal commercial transaction.

3 MR. TURGEON: Your Honor, I don't -- I
4 don't think we even need to --

5 THE COURT: You may not need to.

6 MR. TURGEON: -- reach that.

7 THE COURT: But why don't you just tell me.

8 MR. TURGEON: Why is not a legal commercial
9 transaction?

10 THE COURT: Why is it not within the
11 definition of a legal commercial transaction as set
12 forth in the regulations?

13 MR. TURGEON: Well, it wasn't legal because
14 it wasn't -- it wasn't disclosed either under 951 or
15 FARA.

16 THE COURT: Well -- but doesn't -- isn't
17 that circular, that it only needs to be disclosed if
18 it's --

19 MR. TURGEON: It needs to be --

20 THE COURT: -- on behalf of -- if it's
21 within the definition of what's prohibited?

22 MR. TURGEON: Right. And it is prohibited,

1 not by this statute, by -- by FARA, a different
2 statute, Your Honor. This is -- and that's -- and
3 that's the distinction. That's why I brought up the
4 legislative history, that was what Congress was
5 trying to explain.

6 THE COURT: That's the -- that's the
7 obligation to disclose within the filing. All
8 right. But outside of that context, let's assume
9 they never -- let's assume they never filed the FARA
10 statement. So you would not be -- they would not be
11 prosecuted for false filings?

12 MR. TURGEON: Well, at the time of the
13 offense, they hadn't actually filed a FARA
14 statement.

15 THE COURT: Okay. So --

16 MR. TURGEON: So they were in violation of
17 FARA when the 951 conspiracy was underway.

18 THE COURT: All right. But whether you
19 call -- whether you call it a defense or an element,
20 someone that's engaged in a legal commercial
21 transaction is not violating this provision, this
22 951, correct?

1 MR. TURGEON: That's -- yes, Your Honor, if
2 someone qualifies under legal commercial
3 transaction --

4 THE COURT: Right.

5 MR. TURGEON: -- that's --

6 THE COURT: And that's my question.

7 MR. TURGEON: That is a defense to the
8 statute.

9 THE COURT: Okay. Whether you call it a
10 defense or an element, explain to me why the
11 activities pertaining to the op-ed and the lobbying,
12 separate and apart from the FARA filing itself, is
13 not within the definition of a legal commercial
14 transaction as that term is defined in the
15 regulations.

16 MR. TURGEON: I mean -- may I take a
17 moment, Your Honor?

18 THE COURT: Yeah.

19 MR. TURGEON: Your Honor, I just want to
20 clarify is Your Honor asking whether an op-ed in
21 general --

22 THE COURT: No, what's alleged --

1 MR. TURGEON: -- is a commercial
2 transaction --

3 THE COURT: No, what's alleged in the
4 indictment as far as the activities of the
5 conspiracy and of Mr. Rafiekian with respect to the
6 publication of the op-ed and the lobbying
7 activities. And my question is explain to me why
8 those descriptions of what was done with respect to
9 the op-ed and -- and the lobbying activity don't
10 follow within the definition of a legal commercial
11 transaction, as that term has been defined in the
12 regulations.

13 MR. TURGEON: Well, Your Honor, because
14 it's not, first of all -- because, as I said, it's
15 not legal because it's in violation of FARA. And
16 second --

17 THE COURT: But it's --

18 MR. TURGEON: This is a -- this is a
19 registration statute, Your Honor. And, you know, I
20 think we're -- I want to make sure, you know, Your
21 Honor, the defense's focus is whether conduct is
22 inherently wrongful or not. And, as I explained,

1 that is not -- that is not the operative test as to
2 whether the legal commercial transaction exception
3 is a defense. It does not need to be alleged in the
4 indictment or an element which does.

5 I mean, had someone engaged -- written an
6 op-ed for a foreign government and disclosed it,
7 that would not be in violation.

8 THE COURT: Okay. Let me ask you this
9 question, without suggesting the Court's made a
10 decision. Let's assume the Court were to conclude
11 that it is an element of the offense. What's your
12 position as to the sufficiency of the indictment as
13 to 951?

14 MR. TURGEON: It's our position that the
15 efforts and obfuscation that included making --
16 causing false statements to be made --

17 THE COURT: In the FARA filing?

18 MR. TURGEON: In the FARA filing.

19 THE COURT: But that's not the 951 charge,
20 correct?

21 MR. TURGEON: That is -- that is conduct in
22 furtherance of that 951 charge, Your Honor.

1 THE COURT: That's part of your conspiracy
2 claim, that's not -- that's not part of the 951
3 substantive offense, is it?

4 MR. TURGEON: Your Honor, the -- the
5 efforts of obfuscation continued throughout the
6 conspiracy and up through the FARA filing. I mean,
7 they were hiding what -- what they were doing and
8 for whom they were doing it from -- from day 1 up
9 until the FARA filing. I mean, those are all
10 acts --

11 THE COURT: But if what they were doing was
12 not a violation of the statute, it doesn't matter
13 whether they were concealing it or not, does it?

14 MR. TURGEON: That would be true, Your
15 Honor, if that -- if that were the case, but here it
16 is a violation of FARA, which is not the same
17 statute as 951.

18 THE COURT: But you're saying it was a
19 violation of the statute for them to engage in the
20 publication of the op-ed or the -- or the lobbying
21 without disclosing their status as an agent for the
22 Turkish Government, correct?

1 MR. TURGEON: Yes, Your Honor, that's --
2 that's --

3 THE COURT: But if the activity itself
4 didn't trigger that obligation, then how -- how is
5 there -- how is there a 951 violation?

6 MR. TURGEON: The -- Your Honor, the -- the
7 unlawfulness is not triggered by 951 itself. I
8 understand the bootstrapping argument, that's what
9 Your Honor is asking about, I believe. It's not --
10 the 951 viol- -- I understand what Your Honor is
11 saying, it's not a violation of 951 that makes it
12 unlawful because that would be circular, it's a
13 violation of FARA that makes it unlawful and it's
14 a -- it's an act in furtherance of the conspiracy to
15 violate both 951 and FARA.

16 THE COURT: That required the actual filing
17 of FARA, correct? I guess that's what I'm trying to
18 understand. If -- absent the filing of the FARA
19 statement, in which I understand you -- I understand
20 the Government's theory that there were false
21 statements and there were false statements whether
22 or not there was obligation to file in the first

1 place, but in the absence of the FARA filing, let's
2 assume it was never -- let's assume that when the
3 DOJ got in touch with Covington and said, you know,
4 think about whether you need to do a FARA filing and
5 Covington decided we looked at this, we don't think
6 there's -- we don't think we need to file and he
7 never filed.

8 And the question then is under those
9 circumstances, how would you have a 951 violation
10 if -- if you -- based on the op-ed and the lobbying
11 and nothing else.

12 MR. TURGEON: Yes, Your Honor.

13 Your Honor, the conspiracy and the
14 substantive 951 violation are separate. I mean --

15 THE COURT: I understand that.

16 MR. TURGEON: The conspiracy still stands.

17 THE COURT: I understand that point, but
18 stay with 95 -- 951.

19 MR. TURGEON: But with regard to the op-ed,
20 Your Honor, I mean, I have to focus again, this is a
21 registration statute. I mean, the conduct itself is
22 not the issue, it's the lack of registration when

1 engaging in conduct is the issue. I -- I don't know
2 what else to say on that.

3 THE COURT: But it's -- but it's the --

4 MR. TURGEON: Your Honor --

5 THE COURT: It's the covered activity that
6 triggered the filing obligation, correct?

7 MR. TURGEON: Yes.

8 THE COURT: Right. So then isn't it proper
9 for the Court to focus on whether the indictment
10 alleges conduct that triggers the filing obligation?

11 MR. TURGEON: If Your Honor --

12 THE COURT: Under 9 -- notification
13 requirement under 951. And if the Court were to
14 conclude that, based on the allegations, the
15 activity that is alleged required notification under
16 951 in fact was not conduct that required
17 notification, then why should the 951 count go
18 forward?

19 MR. TURGEON: Your Honor, the Court would
20 be incorrect in so concluding because we have here
21 both conspiracy to violate FARA and we have
22 substantive FARA violations.

1 THE COURT: I understand. I understand.

2 MR. TURGEON: That are -- that are conduct

3 illegal --

4 THE COURT: I understand there's a --

5 MR. TURGEON: And are not lawful.

6 THE COURT: I understand there's a
7 conspiracy count that's separate and apart from 951.

8 And I understand, theoretically, you can have a
9 conspiracy to violate a law that, in fact, your
10 conduct never violated. I understand all that.

11 MR. TURGEON: Right.

12 THE COURT: I'm just focused on the 951
13 charge now, Count 2.

14 MR. TURGEON: The substantive 951 charge,
15 Your Honor, the conduct alleged in the indictment
16 is -- does not qualify as being a commercial
17 transaction.

18 THE COURT: Why?

19 MR. TURGEON: Because it was illegal under
20 FARA, which is a different statute.

21 THE COURT: Okay. So it was illegal under
22 FARA?

1 MR. TURGEON: Yes, Your Honor.

2 THE COURT: For them to engage in conduct
3 relative to the op-ed and the lobbying?

4 MR. TURGEON: Without registering, Your
5 Honor, yes. And that's exactly what Congress
6 intended in the legislative --

7 THE COURT: What -- what provision of FARA
8 are you talking about there?

9 MR. TURGEON: Your Honor, they were acting
10 as agents of foreign government without -- without
11 disclosing -- I mean, FARA --

12 THE COURT: You're talking about 6 -- is it
13 651, right?

14 MR. TURGEON: 612, Your Honor.

15 THE COURT: 612?

16 MR. TURGEON: Yes.

17 THE COURT: So their -- so their lobbying
18 activity and publishing with op-ed, under the
19 Government's theory, was a violation of Section 612
20 absent registration?

21 MR. TURGEON: Yes, Your Honor.

22 THE COURT: Okay.

1 MR. TURGEON: And that is completely
2 consistent with the legislative history of 951 that
3 says activities that violate FARA don't qualify for
4 this exception.

5 And I have that legislative history if Your
6 Honor would like -- would like to see that
7 provision. And it's cited --

8 THE COURT: Right.

9 MR. TURGEON: -- in our brief.

10 THE COURT: But it violated FARA only if
11 they were acting as an agent of the foreign
12 government, correct?

13 MR. TURGEON: As defined by FARA, yes, Your
14 Honor. Yes.

15 THE COURT: All right. It seems to me
16 we're back to the same issue.

17 MR. TURGEON: Your Honor, there -- there
18 are different statutes, there -- there is some
19 overlap, but there are different statutes.

20 THE COURT: So you're suggesting that
21 the -- the -- the definition of agent that's in 951
22 is a different definition than the definition of

1 agent under 612?

2 MR. TURGEON: It is, Your Honor. Yes, it
3 is.

4 THE COURT: All right.

5 MR. TURGEON: And, as Your Honor can see,
6 those definitions are markedly different.

7 THE COURT: All right.

8 MR. TURGEON: Another point I wanted to
9 raise, Your Honor, is -- so Truong, the defense's
10 arguing vagueness and they're pointing out this is
11 an as-applied challenge and that's -- they're saying
12 it's not a facial vagueness challenge, and they cite
13 that as a basis to ignore the two holdings in this
14 case or two holdings relevant here that they don't
15 like, versus Truong, which the Fourth Circuit held
16 in 951 was not vague or overbroad even when it had
17 no limitations --

18 THE COURT: Right. I understand that
19 argument.

20 MR. TURGEON: -- not the limitations we're
21 talking about. And Duran, which when faced with the
22 exact same question that we are here debating, found

1 that the legal commercial transaction exception is
2 an affirmative defense that doesn't need to be pled
3 in the indictment, it's not an element.

4 THE COURT: Although Duran, you're talking
5 about District Court opinion in Duran?

6 MR. TURGEON: Yes, Your Honor.

7 THE COURT: Yeah. The facts are really
8 quite different than here, weren't they? They
9 had -- they relied on extortion and bribery
10 activities that just simply aren't here.

11 MR. TURGEON: They -- they -- Your Honor,
12 they did not -- the facts are different, but the
13 Court did not rely on those different facts --

14 THE COURT: I understand.

15 MR. TURGEON: -- in reaching its opinion.
16 The Court analyzed the statute under Cook and
17 McKelvey, which is what this Court should do now.

18 THE COURT: All right.

19 MR. TURGEON: Thank you.

20 THE COURT: All right. Counsel, what about
21 this point that the definition of agent is different
22 for purposes of FARA registration than for 951?

1 MR. TYSSE: I welcome that point, Your
2 Honor, because I think that is a concession that
3 this indictment is therefore defective. I make a
4 couple points with it. First of all, they did not
5 actually allege in their brief that we violated
6 FARA, the substantive count of FARA, and therefore
7 it's not been briefed. Okay. I'll just put that
8 out to begin with.

9 THE COURT: Right. But it was a -- it was
10 an object of the conspiracy.

11 MR. TYSSE: Well, actually, I just took a
12 look at that, Your Honor. The object of the
13 conspiracy is that we conspired to willfully make a
14 false statement on a FARA form under 618(A)(2).

15 THE COURT: Right.

16 MR. TYSSE: 618(A)(1) is the provision that
17 says it's a crime to violate any other provision of
18 FARA. And so they have not alleged that we have
19 that as an object of the conspiracy. I think at a
20 minimum they would have to fix it on that.

21 But more broadly, Your Honor, they haven't
22 actually alleged anywhere in the indictment that we

1 violated the substantive elements of FARA. This is
2 a lawyer argument that is coming today for the first
3 time in this courtroom that we should have -- we
4 should have registered under FARA.

5 Now, they didn't bring a charge against us
6 and I can only speculate why my client was not
7 charged for the substantive FARA violation, but, you
8 know, I -- I can offer some speculation perhaps
9 because it's a -- it's a lower crime, it's only a
10 five-year term versus a ten-year, or perhaps because
11 it requires a willful violation of FARA versus this
12 statute which the Government contends only requires
13 general intent.

14 So perhaps the Government realized that it
15 would be much harder to charge under FARA because my
16 client spoke with multiple lawyers, three different
17 sets of lawyers during the course of this alleged
18 conspiracy about his FARA filing obligations. So
19 I -- I have a feeling that might be one of the
20 reasons why they have not alleged it.

21 So not only have they not charged us with a
22 substantive violation of FARA, there is nothing in

1 the indictment that even refers to the fact that
2 that is what -- that that was the conduct that --
3 you know, that violated any federal or state law.
4 So at a bare -- so at a bare minimum, it seems like
5 they should have to go back. Go back to the grand
6 jury, get a new indictment that actually either
7 charges us with a substantive FARA violation or at
8 least spells out to give my client notice.

9 And, again, the whole point of the Fifth
10 and Sixth Amendment rights, the basis of our motion
11 to dismiss is that my client needs notice of how to
12 put on a defense; and right now all the indictment
13 says is that we committed unlawful acts by operating
14 an op-ed and engaging in lobbying activity and then
15 also conspired to file false forms at the very tail
16 end of that -- under that core agency activity.

17 My client is not on notice of how he should
18 put on a good defense of the charge that we somehow
19 were acting in a non-legal commercial manner. I
20 mean, they concede that it was First Amendment
21 activity and that it was commercial in nature, he
22 got paid for it.

1 I mean, and -- and we -- the FIG company
2 sold services to the general public. This is not a
3 situation where it was an employee of a foreign
4 government.

5 So I think at a bare minimum the
6 Government's argument admits that this indictment
7 can't survive regardless of whether some other
8 indictment that they want to try to charge next will
9 survive.

10 Beyond that, just a small point, the
11 Government says it several times that we were
12 misleading and it was quoted -- on page 13 of our
13 brief we quote the legislative history that says
14 individuals who represent foreign governments in
15 political activities. I don't know why they've
16 accused us a couple times of being misleading.

17 The second point I want to make, Your
18 Honor -- and I'm only going to make three points
19 total, so please bear with me if you don't mind.
20 But the notification statute I think Your Honor is
21 asking about, I think that's actually real key to
22 interpreting this statute in what is exactly covered

1 because, again, the question is this statute is not
2 a statute that says everybody must register, but if
3 you were a roof contractor and you failed to
4 register, you have an affirmative defense and you
5 will get prosecuted for it, that's not what it says.

6 This is a notification statute. It says
7 these people, the following people, essentially,
8 must note -- must register or -- you know, must
9 register as agents of a foreign government. And so
10 by failing, you know, and -- and only agents of a
11 foreign government, as so defined, must register.

12 Okay. I think finally, by focusing on what
13 the actual agency activity was that the Government
14 actually alleges we engaged in that was not legally
15 commercial, I think Your Honor really hit it on the
16 head because even if this was not an element, and we
17 think it strongly is and for purposes of the
18 constitutional avoidance and otherwise, we think
19 it's the best reading.

20 But even if it's not, many cases have held
21 and the Government does not dispute that if you find
22 there's no factual dispute that they haven't

1 actually alleged any underlying non-legal,
2 noncommercial activity, then that -- that's still a
3 basis for dismissing this indictment. And they
4 would have to come back and try again with one that
5 actually properly construed the elements.

6 I'm going to make one -- I'm sorry, one
7 final small point.

8 THE COURT: All right.

9 MR. TYSSE: On the Duran case, you're
10 right, not only is it an unpublished decision from a
11 different circuit that applies a different standard,
12 but the -- the Court specifically said I can't find
13 any relevant legislative history. I don't think the
14 Court grappled with the idea that the defendant
15 would have to, you know, affirmatively prove his own
16 innocence, and if -- if that interpretation was
17 correct.

18 And I think there's one other really
19 notable -- notable aspect of the Duran case, Your
20 Honor, which is that -- that that district court in
21 the Southern District of Florida actually found that
22 it was the Government's burden to prove that an

1 alleged agent was not acting as a diplomatic or
2 consular or officer or attaché. That Court actually
3 found that was an element of the offense. So the
4 Government was really only taking part of the
5 analysis, it's picking and choosing which parts of
6 that it likes because it denies that that part is
7 actually an affirmative element of defense, which I
8 again -- or an element of offense which, again, I
9 think, goes to show that, you know, we -- we need
10 not -- it was not accepted by the 11th Circuit, it
11 was not addressed by the 11th Circuit, as everyone
12 agrees. So I don't think that that should be overly
13 controlling in this circumstance.

14 THE COURT: All right. Thank you.

15 MR. TYSSE: Thank you.

16 THE COURT: Go ahead, Mr. Turgeon.

17 MR. TURGEON: May I respond briefly?

18 THE COURT: Yes.

19 MR. TURGEON: Your Honor -- Your Honor, we
20 have alleged in the indictment that the conduct was
21 unlawful and there is --

22 THE COURT: I understand, but that's not --

1 you don't -- you don't have to say that.

2 MR. TURGEON: There's no need in the
3 indictment, Your Honor, to say what statute it was
4 in violation of.

5 THE COURT: Right.

6 MR. TURGEON: And this would only be the
7 case as well, of course, if this were found to be an
8 element rather than a defense.

9 I want to point out, Your Honor, that in
10 addition to the definition of agent, 951 in FARA
11 defer in the scope of conduct covered, 951 is
12 broader than FARA. And, in this case, the
13 defendants' conduct was, we believe, broader than --
14 than mere violations of FARA, although it included
15 those.

16 And I just wanted to point out too, Your
17 Honor, under their definition, any -- or under their
18 interpretation, any conduct is okay as long as
19 there's a contract. And that's -- that's also just
20 not -- that's not how 951 works. I mean, taking
21 pictures is lawful activity, but conducting
22 surveillance for a foreign government without

1 registering is unlawful under 951.

2 And I could respond to their argument on
3 diplomatic officer exception, Your Honor, which
4 they -- which they raised in their footnote. So we
5 didn't analyze it extensively in our opposition, but
6 there I would suggest the Court conduct the same
7 analysis mandated by Cook and McKelvey.

8 And when you look at the placement of the
9 language, here it is set off by commas, how does the
10 statute read without that language. It reads fine.
11 Whoever acts in the United States as an agent of a
12 foreign government without prior notification to the
13 attorney general, et cetera, et cetera. I mean, the
14 statute makes perfect sense without that diplomatic
15 officer language.

16 And I can -- I can refer to the legislative
17 history for that exception as well. I mean, in 1984
18 Congress amended the statute to add all of the
19 exceptions in Subsection D. And when Congress did
20 so, it added an overlapping diplomatic officer
21 defense in Subsection D, but it didn't take that
22 language out of Subsection A. And so the addition

1 of the language in D shows that Congress intended
2 that language to be defense. Had they thought that
3 the language in A was an element, they wouldn't have
4 needed to add it as a defense in Subsection D.

5 THE COURT: All right. I'll give you the
6 last word since it's your motion if you want to add
7 anything to that.

8 MR. TYSSE: I promise I'll be very brief.

9 THE COURT: All right.

10 MR. TYSSE: Just a few -- a few small
11 points on that one. The first is that, Your Honor,
12 it's not enough to simply say unlawful, as we
13 pointed out before. I'll point you to the U.S. v.
14 Daniels case, which was actually --

15 THE COURT: Right.

16 MR. TYSSE: -- very similar to this. That
17 case, the indictment was actually dismissed post
18 trial, conviction was thrown out because they had
19 failed to allege a specific -- it said, you know,
20 any violation of this chapter shall be violated --
21 and they didn't list a specific section, you know,
22 criminal provision in the indictment. And so even

1 post trial the verdict was tossed out because they
2 forgot to do it.

3 It's even worse here because they don't
4 even say that we violated FARA, they say we
5 conspired to, you know, make false statements, but
6 they don't make any allegation. There's no
7 reference whatsoever to the -- to the FARA violation
8 itself.

9 The second point is the set off by commas
10 point. I mean, the reason, Your Honor -- and I
11 think this is a really important point. The reason
12 why -- first of all, the set off by commas, we cited
13 some language from the Fourth Circuit and the
14 Supreme Court, unlike the Fifth Circuit case that
15 they cite, which uses -- looks at the exact same
16 phrase without lawful authority set off by commas
17 and says that is an affirmative element of the
18 defense.

19 The only case that's actually analyzed is
20 the Duran case that they cite did find it was an
21 affirmative defense. I think we have a pretty good
22 argument that it is, plus it's in Subsection A which

1 they say is the most crucial factor. But I think --
2 I think it actually brings up a really important
3 point, Your Honor, which is that we're not here
4 making a hypertechnical argument about why, you
5 know, the Government's indictment needs to be
6 dismissed because they forgot to say we're not a
7 diplomatic consular, officer, or attaché. We do
8 think that's a defect in the indictment, but
9 presumably it's something they could easily fix with
10 a quick superseding indictment. They'll be able to
11 prove it at trial, that's not why we're here.

12 We're here because we have a substantive
13 practical objection to what the Government has done
14 and it has put our client on trial for up to ten
15 years imprisonment, and it's done so without ever
16 specifying the actual unlawful activity it alleges
17 we engaged in.

18 THE COURT: All right. I understand.

19 MR. TYSSE: Thank you.

20 THE COURT: All right. I'm going to take
21 it under advisement. I'll get a decision shortly --
22 excuse me -- on this as well as the other pending

1 motions.

2 In that respect, there's a motion --
3 pending motion to compel that the Government
4 hasn't -- hasn't responded to yet pertaining to
5 Mr. Rafiekian's statements. What's -- what's the
6 status of the Government's response?

7 MR. TURGEON: Your Honor, could we approach
8 for a brief side bar?

9 THE COURT: Yes.

10 (Whereupon, matters were taken up at the
11 bench under seal.)

12 THE COURT: All right. Thank you, counsel
13 is excused. Is there -- is there something else?

14 MR. GILLIS: Your Honor, you had asked for
15 briefing on the -- on the work product issue.

16 THE COURT: Yes, yes.

17 MR. GILLIS: And -- and we also submitted a
18 memorandum having to do with the coconspirator
19 statements and the --

20 THE COURT: Right. Right. Would you like
21 to have further argument on that?

22 MR. GILLIS: Well, on the work product --

1 THE COURT: All right. I'll hear you.

2 MR. GILLIS: It's not that necessarily I --
3 well, we haven't argued that part yet, Your Honor.

4 THE COURT: All right. All right.

5 MR. GILLIS: So, Your Honor, with respect
6 to the opinion work product argument, there are
7 several points at which the Court can stop without
8 needing to proceed any further. First, with respect
9 to the basic premise on whether this -- these
10 documents were prepared in anticipation of
11 litigation.

12 THE COURT: Right.

13 MR. GILLIS: The fundamental question, it
14 is their burden to establish the work product
15 privilege, which they have not even attempted to do.
16 There's no declarations from the attorneys,
17 there's -- neither from Covington nor from
18 Verderame. There's no declaration from the
19 defendant nor anyone else, nor any evidence provided
20 to the Court to suggest that any of this was
21 prepared because of litigation, which is the
22 standard. And because --

1 THE COURT: Well, not all of it was
2 prepared following in response to the DOJ inquiry.

3 MR. GILLIS: Well, as a matter of fact,
4 Your Honor --

5 THE COURT: Isn't that right?

6 MR. GILLIS: I'm sorry?

7 THE COURT: Isn't that correct?

8 MR. GILLIS: The question is whether it was
9 prepared subsequent to the DOJ inquiry?

10 THE COURT: Correct.

11 MR. GILLIS: I believe it was, Your Honor.

12 THE COURT: Right.

13 MR. GILLIS: Yes, that the conversations
14 between -- among -- well, between Covington and the
15 clients began after the -- the inquiry by the
16 Department of Justice.

17 THE COURT: Right.

18 MR. GILLIS: As we've argued, however, Your
19 Honor, that does not automatically mean that it is
20 created in anticipation or because of litigation.
21 And, in fact, it's still their burden to establish
22 that that, under -- under the Fourth Circuit law

1 that we have -- that we have provided in our briefs,
2 if I may point the Court to --

3 THE COURT: Let me -- let me ask you one
4 question.

5 MR. GILLIS: Yes, sir.

6 THE COURT: The specific statements that
7 you want in really haven't been identified, but just
8 as a general proposition, are you -- are you trying
9 to get in statements that were made to Covington
10 other than statements that you contend were made to
11 Covington for the purposes of the FARA public
12 filing?

13 MR. GILLIS: Certainly, Your Honor, yes.

14 THE COURT: All right.

15 MR. GILLIS: We definitely are.

16 THE COURT: All right.

17 MR. GILLIS: Because those statements
18 reflect an effort to conceal the involvement of the
19 government of Turkey and to misrepresent the
20 significance of certain documents that were created
21 before the FARA inquiry and that predated the
22 opinion piece that ultimately resulted in the

1 FARA --

2 THE COURT: All right.

3 MR. GILLIS: -- inquiry.

4 THE COURT: All right.

5 MR. GILLIS: So absolutely, Your Honor, we
6 are -- and, in fact, we contend that none of it is
7 privileged at least on work product grounds because
8 they have not met the burden, they have -- as I've
9 already said.

10 If I could, Your Honor, point the Court's
11 attention to Government's Exhibit 90. I don't know
12 if you have it available, handy. If not, I can hand
13 up my copy.

14 THE COURT: Which -- what is it?

15 MR. GILLIS: It's the initial letter from
16 the FARA unit on November 30, 2016. And does the
17 Court have it, Your Honor?

18 THE COURT: I don't -- not immediately. If
19 you have an extra copy.

20 MR. GILLIS: I don't have an extra one, but
21 I can try to remember what it says, Your Honor, if
22 you -- if you'll take mine. Unfortunately it has my

1 notes on it.

2 THE COURT: That's all right. Was it
3 attached to your motion for a supplemental filing?

4 MR. GILLIS: It was attached to the
5 original motion to establish the crime fraud
6 exception --

7 THE COURT: All right.

8 MR. GILLIS: -- in connection with this --
9 with which this supplemental filing --

10 THE COURT: I should have it.

11 MR. GILLIS: -- is being made.

12 THE COURT: Hold on. Number 90?

13 MR. GILLIS: Yes, sir. Is it not there,
14 Your Honor?

15 THE COURT: I'm not finding it immediately.
16 Why don't you --

17 MR. GILLIS: If I may, Your Honor, then --

18 THE COURT: Yeah.

19 MR. GILLIS: -- point the Court's attention
20 to the two parts that I have circled or underlined
21 there, Your Honor. In the second paragraph, the
22 FARA unit expressly states that they routinely make

1 these inquiries. There's no threat of litigation or
2 there's no implication that they've committed any
3 sort of crime, there's no implication yet that
4 they've even violated FARA. They're merely making
5 an inquiry whether the defendant has -- well,
6 whether FIG had an obligation to file, and that
7 the -- the last paragraph of the -- of the letter
8 also is in a perfectly conversational tone that does
9 not in any way suggest that there's anything wrong
10 that have -- had been done. There's no reason at
11 that point -- certainly they've offered no reason to
12 suggest that simply because the receipt of that
13 letter, they were suddenly in anticipation of
14 litigation.

15 So that this -- that anything that they
16 produce -- what they're basically contending is that
17 anything that happened after that letter, anything
18 that took place within Covington, Verderame,
19 anything at all is covered by in anticipation of
20 litigation; and that just flies in the teeth of any
21 number of Fourth Circuit precedent, Your Honor.

22 If I also may direct the Court's attention

1 then to Covington's reply to that letter, which I
2 have provided to the Court. It's the one dated
3 January 11, 2017.

4 THE COURT: I have that one.

5 MR. GILLIS: Thank you, Your Honor.

6 THE COURT: That is in the third paragraph,
7 there among other things, again, no threat of -- or
8 no suggestion that there's been a violation, none
9 whatsoever. And then Covington in response states
10 in that third paragraph based on currently available
11 information we have -- anticipate that General Flynn
12 and FIG likely will file a FARA registration
13 statement in lieu of the Lobbying Disclosure Act
14 filing that FIG filed earlier.

15 Again, if they're suggesting -- if they're
16 contemplating the filing of a FARA statement, that
17 certainly suggests that they're not contemplating
18 litigation over existence of a FARA violation.
19 They're simply saying there we anticipate filing
20 FARA registration. Again, it completely undercuts
21 the notion that anything was prepared because of --
22 which is what the Fourth Circuit requires -- because

1 of anticipated litigation. And, again, it's their
2 burden to come forward with that. They have failed
3 to do so in any way whatsoever.

4 And then, again, Your Honor, you have with
5 you the March 3rd letter, again from Covington to
6 the FARA unit; and in the -- at the end of the
7 fourth paragraph -- and, again, this is antic- --
8 this is actually providing FARA filing to eliminate
9 any potential doubt. The Flynn Intel Group,
10 therefore, is electing to file a registration under
11 FARA in lieu of its prior LDA registration.

12 There's nothing that takes place between
13 Covington's initial letter saying we anticipate
14 filing the FARA and this letter saying that they are
15 filing the FARA --

16 THE COURT: Okay.

17 MR. GILLIS: -- to -- to suggest that they
18 were contemplating any litigation, and certainly not
19 that all the documents -- all the statements made to
20 the attorneys and anything that they wrote down was
21 done in anticipation of litigation.

22 THE COURT: Okay.

1 MR. GILLIS: Nor, Your Honor --

2 THE COURT: So if your position is correct
3 then, all of the Coving- -- all of what we're
4 calling work product on the part of Covington would
5 be reachable once you made the crime fraud exception
6 showing?

7 MR. GILLIS: Yes, Your Honor. Actually,
8 what -- our contention is that it's not work product
9 to begin with. To be clear, Your Honor, if -- if
10 the client comes in and discloses all sorts of --
11 all sorts of manner of financial documents, it
12 discloses everything to the attorney in connection
13 with the filing of an IRS form or the filing of,
14 let's say, for that matter a FARA filing.

15 If they come in and disgorge all of that
16 information to the attorney, leaving -- where
17 there's no anticipation of litigation, all of that
18 information could be provided upon establishing the
19 attorney -- the exception of the attorney-client
20 privilege.

21 THE COURT: Well, that was my question.
22 Because under those circumstances, it wouldn't be

1 privileged in the first instance.

2 MR. GILLIS: That's what I'm saying, Your
3 Honor. I'm saying --

4 THE COURT: And that was my question
5 initially, whether you're trying to get in
6 statements made other than statements that wouldn't
7 be privileged in the first instance because they
8 were provided for the purposes of a public filing.

9 MR. GILLIS: That is correct, Your Honor.
10 We are -- we are seeking -- I beg your pardon if I
11 misunderstood the -- whether, as a basis of the
12 attorney-client privilege, it's being officiated by
13 the crime fraud exception.

14 THE COURT: Right. Separate and apart from
15 whether it was privileged in the first place.

16 MR. GILLIS: Exactly, Your Honor.

17 THE COURT: Right.

18 MR. GILLIS: I mean, it's vitiated, but the
19 crime fraud exception, I submit we've established in
20 spades. I think that -- I submit that that -- that
21 overcomes anything else -- everything else except
22 that for which they have established, as they must,

1 the existence of that privilege.

2 THE COURT: But getting back to my
3 question, are there statements that you want to get
4 in that in your view would not be covered by the
5 proposition that they weren't privileged in the
6 first place because they were provided for the
7 purpose of public filing and you have to rely on
8 some exception to the attorney-client privilege,
9 because they are privileged?

10 MR. GILLIS: Well, as to that, Your Honor,
11 we have -- we have filed those cases in our brief
12 and I don't need to argue that again. Our point is
13 that -- that -- to be clear, there are certain
14 documents that, yes, all of it we submit is --
15 let's -- let's assume for argument that it's all
16 covered by the attorney-client privilege.

17 THE COURT: So if the Court were to rule
18 that --

19 MR. GILLIS: Yes.

20 THE COURT: -- the crime fraud exception
21 doesn't apply, all right, to any privileged
22 information, you're telling me that doesn't matter

1 because you still can get everything you want to get
2 in under the -- under the principle that it wasn't
3 privileged in the first instance because it was
4 provided for the purposes of public filing?

5 MR. GILLIS: Well, I believe that we could
6 not take that -- well, Your Honor, I think we have
7 to -- again, I believe it would be their
8 responsibility -- I'm trying to -- I'm not trying to
9 thread the needle here, Your Honor. I'm just trying
10 to understand -- make sure that I've made my point
11 clear.

12 There would be certainly a universe of
13 documents and statements made to the attorney that
14 were made for the purpose of a public filing and
15 it's not limited exclusively to what's in that
16 public filing.

17 THE COURT: I understand. That goes to the
18 scope of the -- the scope of what's not privileged.

19 MR. GILLIS: Yes, Your Honor.

20 THE COURT: Right.

21 MR. GILLIS: And so at this point we don't
22 necessarily know all of which was intended to be

1 disclosed and that which might not have been
2 intended to be disclosed. But the bulk of what --
3 well, I should say basically everything we plan to
4 rely upon would also fall under that exception
5 because it was either intended to be disclosed or it
6 was provided in anticipation of the preparation of a
7 document that would disclose the substance of what
8 was discussed between the attorney and the client.
9 And to the extent that that's our argument -- and to
10 that -- to the extent that it -- I completely lost
11 my way there, Your Honor.

12 THE COURT: That's all right.

13 MR. GILLIS: I beg your pardon.

14 THE COURT: That's all right. I'm sure
15 you'll get back on track here in a second.

16 MR. GILLIS: It's not a guarantee, Your
17 Honor. I -- if I may, our position would be that
18 what is -- what was discussed is -- would
19 certainly -- now I'm back to where I was. So all
20 that we plan to introduce basically, Your Honor, was
21 part of what would fall within that exception,
22 because it was all within the ambit of the

1 preparation of this FARA --

2 THE COURT: All right.

3 MR. GILLIS: -- filing. And so to that
4 extent, we rely on our -- on our papers with respect
5 to the public disclosure --

6 THE COURT: Right.

7 MR. GILLIS: -- question. That, we rely on
8 our papers.

9 THE COURT: Right.

10 MR. GILLIS: If I may continue though --

11 THE COURT: Sure.

12 MR. GILLIS: -- with respect to the work
13 product document. So I've already --

14 THE COURT: If you're correct, you don't --
15 you don't even -- all the other issues are
16 irrelevant. It doesn't matter whether it's work
17 product, it doesn't matter -- it doesn't matter if
18 it's work product, it doesn't matter if it's crime
19 fraud because they -- they don't pertain unless
20 you're dealing with nonprivileged information in the
21 first instance.

22 MR. GILLIS: Exactly, Your Honor.

1 THE COURT: Right.

2 MR. GILLIS: Now, with respect to the -- in
3 addition to having to prove the anticipation of --
4 because of litigation harm -- pardon me, Your
5 Honor -- they also have to identify with specificity
6 exactly what it is that they contend is covered by
7 the punitive privilege. And that is clear from the
8 cases that we've cited, they've not even made an
9 effort to distinguish those cases.

10 THE COURT: Well, of course, all of this is
11 within the context of not knowing what specific
12 statements or documents you're talking about.

13 MR. GILLIS: Well, Your Honor --

14 THE COURT: Right?

15 MR. GILLIS: No, well -- what specific
16 statements I submit, Your Honor, that the Fourth
17 Circuit makes clear, that it's the other way around,
18 that they are the ones asserting the privilege with
19 respect to conversations and documents between their
20 client and -- and -- and Covington.

21 THE COURT: I understand that, but whether
22 you -- with regards to whose burden it is with

1 respect to making any particular showing, you
2 haven't identified, at least in court, specifically
3 what -- what statements or what documents and
4 statements you want admitted, correct?

5 MR. GILLIS: Well, actually, Your Honor, we
6 have allowed them to review at length the 302s that
7 we had of --

8 THE COURT: No, I understand. But have
9 you -- I mean, but you haven't identified specific
10 statements that you're going to put a witness on the
11 stand and try to get in.

12 MR. GILLIS: I don't believe any Court has
13 required that, Your Honor.

14 THE COURT: I understand.

15 MR. GILLIS: Okay.

16 THE COURT: Okay.

17 MR. GILLIS: I'm sorry, Your Honor.

18 THE COURT: All right.

19 MR. GILLIS: All right. So what you're
20 asking is have we identified the specific
21 statements --

22 THE COURT: Right.

1 MR. GILLIS: -- that we plan to introduce?

2 THE COURT: And the answer is no, correct?

3 MR. GILLIS: I think the answer is that --
4 that we have not identified each and every
5 statement.

6 THE COURT: Right.

7 MR. GILLIS: We have -- however, we have
8 provided the 302s that were written of the
9 interviews. And if I may say, Your Honor, basically
10 all of that, I would say everything in those 302s,
11 we plan to introduce. Because everything that's in
12 302s has some relevance to this case.

13 THE COURT: All right.

14 MR. GILLIS: So I submit that we have
15 sufficiently identified with considerable detail
16 exactly what we plan to introduce. And to the
17 extent that -- that it's not explicitly stated in
18 the -- in the 302 itself, it's certainly clear from
19 the interfuse of what's there that -- that we plan
20 to cover that particular subject.

21 THE COURT: All right.

22 MR. GILLIS: So with respect to that

1 subject matter, they're certainly able to do that
2 and any documents related to that. And actually
3 with respect to the documents, as I said, we have --
4 well, first we have identified them in the
5 indictment; and as to those allegations, we have
6 provided them with the specific exhibit numbers.
7 And the Court has some of those, but we -- as I
8 said, we produced that basically on the -- at the
9 arraignment, we produced those documents.

10 THE COURT: I understand. All right.

11 MR. GILLIS: So if I may proceed now with
12 the specificity --

13 THE COURT: Yes.

14 MR. GILLIS: -- question.

15 So the Fourth Circuit has been explicit
16 that the party asserting the privilege must
17 establish the privilege as to each document over
18 which they assert the privilege. And, as I said,
19 they have not tried to distinguish those cases in
20 which the Fourth Circuit has made that abundantly
21 clear. And as -- as we cited in our -- in our
22 brief, the -- the Court in Solace, the Fourth

1 Circuit in Solace made clear that because the party
2 asserting the privilege in that case had failed to
3 provide privilege logs or identify the litigation
4 for which the specific documents were prepared, we
5 see no reason to even reach the issue beyond that.
6 And as they said, explicitly, the party claiming the
7 privilege bears the burden of demonstrating the
8 applicability of the privilege to specific
9 documents. And, again, in National Union, the
10 Fourth Circuit said determining the driving force
11 behind the preparation of each requested document is
12 therefore required in resolving the work product
13 immunity question.

14 There -- I -- also, Your Honor, there
15 are -- there are -- oh, my colleague has also
16 pointed out, Your Honor, that with respect to
17 Kristen Verderame, we have no idea what she's going
18 to say because she's waiting to -- well, she has not
19 agreed to talk to us pending a decision from this
20 Court on that question.

21 THE COURT: All right.

22 MR. GILLIS: So we have no idea what

1 Ms. Verderame may say.

2 THE COURT: All right.

3 MR. GILLIS: Or what documents, for that
4 matter, she may --

5 THE COURT: Okay.

6 MR. GILLIS: -- she may have.

7 THE COURT: All right. Anything more on
8 that?

9 MR. GILLIS: It sounds as if the Court has
10 heard enough on that. If I --

11 THE COURT: Do you want to argue the --
12 there's more than happy to be further heard on the
13 coconspirator elements.

14 MR. GILLIS: Actually, Your Honor, I would
15 like to get to the -- pardon me, our third argument
16 there, which is that the opinion work product, even
17 if it applied, is vitiated in these circumstances,
18 that the defendant has no right to assert it in
19 these circumstances.

20 The only two circuits to have expressly
21 considered the issue or, for that matter, considered
22 the issue at all, the Fifth and the Sixth

1 Amendment -- the Sixth -- Fifth and Sixth Circuits
2 rather, as we cited in our brief, have specifically
3 held that even with respect to opinion work product,
4 where you have a willing attorney to provide that
5 opinion work product, the client who has been found
6 by a prima facie showing to have engaged in criminal
7 activity is not permitted to assert the opinion work
8 product.

9 And that only makes sense, Your Honor,
10 because what -- what essentially their position
11 would be and any rule to the contrary would be that
12 an attorney could be -- that if I -- well, to begin
13 with, first, the most sacred right in this context
14 being the attorney-client privilege and those
15 communications that take place between the two,
16 could be vitiated, and yet this particular
17 subsection of information could be precluded by a
18 guilty client from being revealed in -- which was
19 created in connection with corrupt litigation that
20 he instigated because he gave false information to
21 the innocent attorney.

22 And so that -- that -- the mere fortuity of

1 there being litigation does not then give the
2 defendant a right to prevent -- to close the mouth
3 of a willing attorney when he's -- he's committed a
4 crime of fraud and he's waived or vitiated or
5 forfeited his attorney-client privilege, which is
6 more sacred than the work product privilege, and
7 that in those circumstances he's still allowed to
8 assert the opinion work product. And it can't be
9 that, Your Honor, because if the attorney is
10 willing, it's -- it's a privilege that's -- that at
11 least in the first instance is -- belongs to the
12 attorney and the client; but as to whatever interest
13 the client has in that opinion work product, it is
14 vitiated by the existence of the crime of fraud that
15 he has --

16 THE COURT: All right.

17 MR. GILLIS: -- has instigated that
18 resulted in the very work product we're talking
19 about.

20 THE COURT: All right. I understand. I
21 understand your position.

22 MR. GILLIS: Okay. If I may have one

1 moment, Your Honor.

2 THE COURT: Yes.

3 MR. GILLIS: Thank you for your patience,
4 Your Honor.

5 THE COURT: All right. Did you want to be
6 heard on the coconspirator statute any further?

7 MR. GILLIS: My colleague is going to argue
8 that, Your Honor, if you --

9 THE COURT: All right. Let me -- let me
10 hear from Mr. Gibbs.

11 MR. GIBBS: Thank you, Judge.

12 THE COURT: And then we'll have defense
13 respond to both of them.

14 MR. GIBBS: Sure. That's fine.

15 Judge, I think most of this is covered in
16 the moving papers.

17 THE COURT: Right.

18 MR. GIBBS: But I think the key point that
19 I want to get across here is, as the Court obviously
20 knows, the conspiracy has two objectives. It's
21 conspiring to conceal the fact that defendant
22 Rafiekian and Alptekin were conspiring together to

1 hide the fact that they were acting as agents of the
2 government of Turkey.

3 THE COURT: Right.

4 MR. GIBBS: And they were conspiring to
5 make false statements related to that.

6 So that's our conspiracy, those are the
7 objectives of it. And throughout, whether they call
8 it the Gulen project or the Turkey project or Truth
9 or Confidence, the objective here was to demonize
10 Fethullah Gulen and to convince the United States
11 Government, without anyone knowing they were working
12 for Turkey, that he should be extradited back to
13 Turkey or charged with crimes of some sort.

14 THE COURT: Right.

15 MR. GIBBS: So that's our conspiracy and
16 the statements that the defense is attempting to
17 suppress go squarely to that. These are not
18 tangential. This is the defendant Rafiekian
19 communicating in e-mails and Skype messages --

20 THE COURT: You're talking about statements
21 that you want to get admitted under 801(d)(2)(e)?

22 MR. GIBBS: Exactly.

1 THE COURT: All right.

2 MR. GIBBS: Right. I mean, this goes
3 squarely to the crime charged here. And, you know,
4 again, as I said, they were during the time of the
5 conspiracy, they're clearly in furtherance of the
6 conspiracy we've alleged. And essentially the
7 defense argument is we haven't proved the existence
8 of a conspiracy here. Well, we've certainly laid
9 out in very detailed terms in the indictment a
10 conspiracy, and, as the Court knows, it's a very
11 favorable standard for the Government. We just have
12 to prove that existence by a preponderance. And our
13 position is we very, very clearly have laid out and
14 have proved that, the existence of that conspiracy
15 by a preponderance, but ultimately the people who
16 will have to decide that are the jury.

17 They need to be -- for us to be able to put
18 on evidence of this conspiracy, we need to be able
19 to put on the coconspirator statements that were
20 made during any furtherance of that conspiracy.

21 THE COURT: Are you trying to get in
22 statements, other than those statements that are

1 reflected in these -- in these exhibits that you
2 attached to your -- to your motion?

3 MR. GIBBS: We are, Judge. Those are some
4 of the statements and we alleged a number of them in
5 the indictment and alleged that they were overt acts
6 in furtherance of the conspiracy. We certainly
7 intend to get all those in, but we didn't list every
8 single statement between, you know, every single
9 coconspirator statement in here, but obviously the
10 defense will have our exhibits at the time --

11 THE COURT: Well, coconspirators consist of
12 Rafiekian and Alptekin, correct?

13 MR. GIBBS: Well -- but we also --
14 remember, Judge, we had the Bill of particulars
15 where we went through the Turkish ministers.

16 THE COURT: Okay.

17 MR. GILLIS: And there were some questions
18 about that.

19 THE COURT: All right. But, yes, I mean,
20 in terms of the statements themselves, we do -- the
21 defense will have our exhibits, we will present
22 witnesses to get various statements in. If there's

1 an objection that an individual statement is not
2 during the furtherance of the conspiracy, which I --
3 I don't think they'll -- the defense will be able to
4 make a persuasive argument to that, but if there is,
5 the appropriate time to deal with that is at the
6 trial when the evidence is offered. It's not
7 wholesale to say -- to make an argument which would
8 effectively result in the dismissal of Count 1.

9 THE COURT: Right. Well, it seems to me
10 there are a couple of issues that are pretty --
11 pretty closely tied together. One is whether
12 there's been a sufficient showing for the purposes
13 of 801(d)(2)(e) to get the -- what would otherwise
14 be hearsay statements in a coconspirator -- alleged
15 coconspirator as substantive evidence admissible for
16 the truth of the statement.

17 The other is whether these -- these e-mails
18 that have passed between Rafiekian and Alptekin can
19 be admitted for some purpose separate and apart from
20 the truth of their content, and it seems to me those
21 are very separate issues that irrespective of
22 whether they -- the substantive statements in those

1 documents can come in without a hearsay problem is
2 separate and apart from whether those documents can
3 come in is simply information -- the fact of a
4 transmittal, the fact of receipt, the fact of
5 information, irrespective of whether it's true or
6 not, that is conveyed to Rafiekian.

7 And your motion really relies solely --
8 your motion goes simply to the 801(d)(2) --
9 801(d)(2)(e) point, correct?

10 MR. GIBBS: It does, Judge, although as the
11 Court knows, we also filed a supplement. I think as
12 with lots of evidence, there are multiple theories
13 under the rule of evidence to get it in. The
14 Court -- Your Honor just mentioned one about sort of
15 not necessarily offered for the truth, the effect on
16 the listener --

17 THE COURT: The fact that he had this
18 information.

19 MR. GIBBS: Right. And really I think in
20 terms of the particular evidence we're talking about
21 here -- and this -- this is primarily communications
22 between the two main actors in this case, the two

1 coconspirators, Alptekin and Rafiekian. As to those
2 communications, we agree that they probably -- the
3 strongest argument for this admission is
4 801(d)(2)(e) that they were coconspirator statements
5 made during, they clearly were during the time of
6 the conspiracy, and in furtherance of that
7 conspiracy to work on this Gulen project on behalf
8 of the government of Turkey.

9 We would also submit that --

10 THE COURT: They come in anyway even if --
11 even if you don't get them under that exception.

12 MR. GIBBS: I would certainly hope so,
13 Judge. And, again, on our supplement we also
14 identified adoptive admissions as another theory
15 under which they should come into evidence.

16 THE COURT: Again, that comes -- that's a
17 theory that gets them in for the truth.

18 MR. GIBBS: Correct.

19 THE COURT: Right.

20 MR. GIBBS: But, yeah, I would argue that,
21 again, 801(d)(2)(e) is a hearsay exception, they
22 come in as not hearsay. We would also offer them

1 for the truth of what's said in the communications.

2 THE COURT: Right.

3 MR. GIBBS: I mean -- and the jury has to
4 consider that.

5 THE COURT: Right. Okay.

6 MR. GIBBS: So unless there are -- I think
7 this was pretty well briefed.

8 THE COURT: It was.

9 MR. GIBBS: Thank you.

10 THE COURT: Ms. Mitchell.

11 MS. MITCHELL: Thank you, Your Honor. And
12 I will address the crime fraud, and Mr. Bereston
13 will address the --

14 THE COURT: Yeah.

15 MS. MITCHELL: -- coconspirator statements.

16 THE COURT: All right.

17 MS. MITCHELL: With the Court's indulgence.

18 It will probably not surprise you to hear I
19 have a different read of all of this than
20 Mr. Gillis. With respect to the question about
21 whether this was in anticipation of litigation, the
22 hypothetical that Mr. Gillis proposes, which is that

1 the client went in and spoke to his attorney about
2 filing a FARA form, without any sort of -- in
3 advance, you know, if we were going to buy into the
4 Government's theory here if they had done that in
5 September, I think the discussion we would be having
6 today is different.

7 But even if in the context of their
8 engagement of Covington, that our client provided
9 information to Covington, that's mixed in and is
10 absolutely layered on the fact that they have
11 received a letter from the Department of Justice.

12 And whether or not the Department of
13 Justice routinely looks at op-eds and decides to
14 send notes to various and sundry op-ed writers, that
15 does not make it routine to receive a letter from
16 the Department of Justice. And it's not just a
17 simple, Gee, can you tell us letter. It's got six
18 very specific questions. And clearly this is a very
19 strident inquiry by the Justice Department.

20 Number 2, Your Honor, the fact that -- with
21 respect to this FARA filing -- and I made this
22 point, but it was not as they cite in their -- in

1 their brief, made in sort of the ordinary course of
2 business. The second point I wanted to make with
3 respect to the FARA filing and the engagement of
4 Covington is attached to our reply -- our sur-reply
5 is the -- the alert that Covington -- Rob Kelner,
6 the very attorney who's involved in this situation
7 writes in August. And, actually, this becomes
8 relevant in the facts of this case, but we're going
9 to put those aside for a moment.

10 But in August the attorney involved here
11 says -- writes a client alert, Have we reached a
12 FARA tipping point in which that author says the
13 tipping point is increased enforcement. So there
14 can be no question that, as an attorney, Mr. Kelner
15 and others are thinking, they have received a letter
16 from FARA -- from the Department of Justice, this is
17 a potential investigation. I don't think there can
18 be any question that this was a potential
19 investigation. And the -- the case that the
20 Government cites, National Union, for the notion
21 that FARA filed in the ordinary course of -- you
22 know, documents filed in the ordinary course of

1 business.

2 THE COURT: Right.

3 MS. MITCHELL: They -- they leave part of
4 that quote out and namely it's the -- that case also
5 finds that if it's prepared because of the prospect
6 of litigation when the preparer faces an actual
7 claim or potential claim following an event that
8 could reasonably result in litigation, that's the
9 standard here.

10 THE COURT: Right.

11 MS. MITCHELL: In Textron those -- those
12 documents are very different than what we have here.
13 Those are tax records that were, in fact, before the
14 investigation. They are -- they are tax records in
15 preparation and notes made to file for an audit.
16 Very different, I think, and I would posit to the
17 Court, than if the Department of Justice said --
18 wrote back and said we're auditing you. I don't
19 think anyone would think that the --

20 THE COURT: Right.

21 MS. MITCHELL: -- the attorney's notes
22 thereafter would be not in anticipation of

1 litigation.

2 THE COURT: How -- from your perspective,
3 does the Court square the work product issue? And
4 let's assume that -- for the moment that the context
5 would confer work product protections. How do you
6 square that position with the proposition that the
7 information provided to Covington for the purposes
8 of a filing wouldn't be privileged in the first
9 instance?

10 MS. MITCHELL: It's complicated, Your
11 Honor. I think -- I think the answer is it's
12 complicated and in this instance, because -- because
13 it is in anticipation of litigation and because it
14 wasn't done simply in the regular course of
15 business, I think it is protected.

16 THE COURT: Even if it were provided -- and
17 I know there's a debate about the scope of what that
18 would be, but let's assume that the information that
19 would otherwise be protected by the work product
20 privilege is also information that was not
21 privileged in the first instance because it was
22 given to Covington for the purposes of a public

1 filing.

2 MS. MITCHELL: And so what I would suggest
3 is, again, I think that would be very difficult to
4 pull apart. And because I think if it -- if it were
5 truly just to make a public filing, there might have
6 been a much more cursory inquiry by Covington, but
7 because the attorneys in their -- in their opinion
8 work product realized that this was going to be far
9 more expansive, undoubtedly they asked more
10 questions, they asked more broad questions. They
11 sought more information than they might otherwise,
12 had they been doing something before there was the
13 contemplation of a potential litigation.

14 And so while -- so I just think the
15 situation here makes it such that unless such
16 information was, in fact, disclosed to the
17 Government which, of course, we would not contest
18 that that's protected, but unless it was disclosed
19 to the Government at some point, we think all of
20 that squarely fits within the opinion work product.

21 THE COURT: All right.

22 MS. MITCHELL: And, Your Honor, just very

1 briefly if I may with respect to the opinion work
2 product very quickly. Mr. Gillis would love to be
3 in the Fifth or Sixth Circuit --

4 THE COURT: I understand.

5 MS. MITCHELL: -- but he's not, he's in the
6 Fourth Circuit. So we strongly believe that absent
7 a showing that the attorneys here were complicit or
8 knew of the crime --

9 THE COURT: Right. And there's no
10 contention of that.

11 MS. MITCHELL: Correct. And then the last
12 point I do want to make is the suggestion -- and I'm
13 not going to try and reargue the point that
14 Mr. MacDougall argued last time, but the notion that
15 we had a willing attorney waive this -- any portion
16 of this is -- is galling to me for the reasons that
17 Mr. MacDougall pointed out.

18 And so Mr. Gillis sort of falls back on,
19 Oh, we had a -- we had a willing attorney who now --
20 recognizing it's inefaceable here, but it just --
21 it --

22 THE COURT: I understand.

1 MS. MITCHELL: It causes me to address the
2 fact that I don't think we had a willing attorney
3 here. We had -- we had another -- a -- another
4 principal of FIG, in the context of his cooperation
5 agreement and under the threat of potential further
6 enforcement, make a determination that was in his
7 best interest and not in the best interest of the
8 corporation.

9 THE COURT: All right.

10 MS. MITCHELL: Thank you very much.

11 THE COURT: All right. Counsel. No, we
12 have one more.

13 MR. GILLIS: Oh, I beg your pardon, Your
14 Honor. Thank you.

15 MR. BERESTON: Your Honor, we argued the --
16 with respect to the 801(d)(2)(e), we argued that at
17 the last hearing and so I won't beat a dead horse
18 and sort of repeat those arguments, but I just will
19 address one point that the Government raised, and
20 that's, you know, because the Government's alleged a
21 conspiracy here, that it's for the jury to decide
22 the existence of that conspiracy, but that's not the

1 standard to admit out-of-court statements.

2 THE COURT: Right. I understand.

3 MR. BERESTON: It's, you know, as Your
4 Honor knows, preliminary evidentiary matters are for
5 the Court to decide, and so the burden is on the
6 Government to show the existence of the conspiracy
7 and that those statements were made during and in
8 furtherance of the conspiracy, and that's what we've
9 argued in our briefing.

10 With respect to the Government's sur-reply
11 on the adoptive admission issue, I'll just say as an
12 initial matter, we don't believe the Court should
13 consider the Government's supplemental response on
14 that issue because -- simply because the Court
15 didn't grant leave for them to address the
16 coconspirator issue. The Court only granted leave
17 for them to brief -- further brief the opinion work
18 product issue.

19 But if Your Honor is inclined to consider
20 any of that, I'm prepared to address the merits of
21 that.

22 THE COURT: You should address it.

1 MR. BERESTON: First of all, Your Honor, to
2 admit a statement as an adoptive admission, the
3 Government must show two things: First, that an
4 innocent defendant would normally be induced to
5 respond to that statement.

6 THE COURT: Right.

7 MR. BERESTON: And, second, whether there
8 exists sufficient foundational facts for a jury to
9 conclude that the defendant heard, understood, and
10 acquiesced in that statement.

11 Now, with regard to the first prong, a
12 defendant would only normally be induced to respond
13 to a statement that's accusatory. And none of the
14 statements offered by the Government here are
15 accusatory. In other words, they're not the types
16 of statements that are contemplated by Rule 801.
17 When we compare the statements put forth by the
18 Government with some of the accusatory statements
19 found in other cases, the distinction becomes clear.

20 For example, Your Honor, in United States
21 versus Williams, the Fourth Circuit offered a
22 helpful example, and if I may just quote from that

1 case, If someone says in the defendant's presence
2 that this is the money the defendant got when he
3 robbed a bank, it's logical for the jury to conclude
4 that the defendant would have spoken up if he had,
5 in fact, not robbed a bank.

6 So the important point here is in Williams,
7 the statement clearly suggests the defendant was
8 involved in criminal conduct, it was a bank robbery.
9 When we compare that with statements offered here by
10 the Government, and I'll just -- if I may quote from
11 Government Exhibit 15 as an example, Mr. Rafiekian
12 wrote -- excuse me, Mr. Alptekin wrote to
13 Mr. Rafiekian and told him he was thrilled at the
14 prospect of working together.

15 Mr. Alptekin went on to say he met with
16 Turkey minister Number 1 and explained our approach.
17 He's receptive and indicated he would like to meet
18 with us during his upcoming visit to D.C. I will
19 inform you and we can strategize how best to
20 approach the meeting.

21 MR. BERESTON: This statement is not
22 accusatory. It's nothing like the example in

1 Williams where one would expect Mr. Rafiekian to
2 speak up. It's a completely innocuous statement
3 about legal conduct. It doesn't come close to
4 suggesting that Mr. Rafiekian was involved in
5 illegal conduct.

6 Now, Mr. Rafiekian disputes this
7 allegation, but even if Turkey was directing
8 Alptekin's actions, there's nothing illegal about
9 that and that's certainly not the crime that's been
10 charged here. The crimes the Government alleges are
11 a failure to give notice under Section 951 and
12 making false statements in a FARA filing. And no
13 out-of-court statements at issue in this motion
14 relate either to those acts or any other crime.

15 Another important point is that
16 Mr. Rafiekian had no personal knowledge of any
17 conversation that Mr. Alptekin purportedly had with
18 Turkish officials.

19 THE COURT: I have one question.

20 MR. BERESTON: Sure.

21 THE COURT: And I'll ask Mr. Gillis when he
22 stands up again, but -- and it was mentioned

1 previously that the statute seems to adopt the
2 common law definition of -- of agent within the
3 context of the definitions. Does that mean that
4 the -- that it also recognizes the agent independent
5 contractor distinction -- common law distinction?

6 MR. BERESTON: With respect to -- I'm
7 sorry, I'm not sure I quite understood your
8 question.

9 THE COURT: Well, you have -- you have
10 under the Government's theory -- well, under the
11 facts whether -- putting aside how you characterize
12 it, you have -- you have Inovo entering in a
13 relationship with FIG. And the issue is whether
14 FIG -- whether FIG was acting and the principals of
15 FIG were acting as the agents of the Turkish
16 Government or whether they were the agents of Inovo.

17 And the question is -- in those kinds of
18 arrangements you oftentimes will have people acting
19 with respect to overall objectives that are other
20 than agents that are acting as what the law refers
21 to as independent contractors where the overall
22 object is agreed to, but the details and the control

1 is left to the individual contractor. I mean, is
2 that a distinction that plays any role in -- in this
3 analysis?

4 MR. BERESTON: I don't know that that plays
5 a role here because there was -- there was no
6 agreement between FIG and the Turkish Government to
7 do anything. And there was no agreement between FIG
8 and -- and, excuse me, Inovo --

9 THE COURT: Well, there was.

10 MR. BERESTON: -- to deprive the Attorney
11 General of -- of notice.

12 THE COURT: Right.

13 MR. BERESTON: Which is the crime that has
14 been charged here. And so regardless of -- of how
15 that comes out, we don't think that the Government's
16 shown an agreement here, which is what they need to
17 show.

18 THE COURT: Well -- but their theory is
19 that FIG was operating at the direction and under
20 the control of Alptekin who was nothing more than a
21 cutout for the -- for the Turkish Government.

22 MR. BERESTON: Right. And that's the

1 Government's theory.

2 THE COURT: That's the Government's theory.

3 MR. BERESTON: Which we obviously -- we
4 obviously dispute that.

5 THE COURT: So the relationship between FIG
6 and Inovo or between FIG and Alptekin seems to me to
7 be pretty critical.

8 MR. BERESTON: Yes, Your Honor. I mean,
9 ultimately FIG engaged with Inovo, which was
10 Mr. Alptekin's company.

11 THE COURT: Right.

12 MR. BERESTON: And they were obviously
13 communicating with Mr. Alptekin.

14 THE COURT: Right.

15 MR. BERESTON: Unless Your Honor has
16 further questions about that.

17 THE COURT: Okay. All right. There may be
18 a point that doesn't go anywhere, but it seems to me
19 that there's a difference between characterizing the
20 relationship between Inovo -- Inovo or Alptekin and
21 FIG as an agency relationship as opposed to an
22 independent contractor relationship.

1 MR. BERESTON: There may be, Your Honor.

2 THE COURT: All right.

3 MR. BERESTON: And if we can further brief
4 that, we're happy to do so.

5 THE COURT: No, it's...

6 MR. BERESTON: Just to get back to the
7 adoptive admissions issue, and I just want to
8 address quickly the second prong of that test. And
9 that's that the Government's failed to show
10 Mr. Rafiekian acquiesce to the out-of-court
11 statements.

12 First of all, there's no direct evidence
13 that Mr. Rafiekian acquiesced to any of those
14 statements. The Government instead relies on a
15 series of unsupportable inferences to show
16 Mr. Rafiekian wouldn't have taken various steps to
17 get the FIG project off the ground if Turkey hadn't
18 green --

19 THE COURT: Right.

20 MR. BERESTON: -- greenlighted the project.
21 But the statements put forth by the Government tell
22 a different story. For a number of those

1 statements, Mr. Rafiekian's initial e-mail out is
2 encrypted, so the Government can only guess as to
3 what that statement says.

4 But for the other remaining statements by
5 Mr. Rafiekian, they don't contain any mention of
6 Turkish officials at all. They don't suggest he was
7 providing information about the project because he
8 believed the Turkish officials were intending to
9 pursue it, and several of the Government's own
10 exhibits support this fact.

11 And if I can just offer an example, in
12 Government's 18-A, after all the other back and
13 forth between Mr. Rafiekian and Mr. Alptekin,
14 Mr. Rafiekian writes to Michael Flynn and, I
15 believe, Phillip Oakley and says, they have been,
16 quote, engaged by a Dutch client for the project,
17 not by Turkey.

18 If Mr. Rafiekian believed Alptekin's
19 statements about the Turkish officials to be true,
20 why did he tell Flynn that they were being engaged
21 by Inovo, which is Mr. Alptekin's company. The
22 Government doesn't have an explanation for this.

1 So the Government hasn't shown
2 Mr. Alptekin's statements would induce a response by
3 Mr. Rafiekian's or that Mr. Rafiekian acquiesced in
4 those statements. And we'd respectfully ask,
5 therefore, that the Court grant Mr. Rafiekian's
6 motion to exclude these out-of-court statements.

7 THE COURT: All right. Thank you.

8 MR. BERESTON: Thank you, Your Honor.

9 THE COURT: Mr. Gillis, I'll let you
10 respond briefly.

11 MR. GILLIS: Thank you, Your Honor. With
12 respect to Your Honor's question about the agency
13 versus --

14 THE COURT: Yeah.

15 MR. GILLIS: We're not relying upon that as
16 a basis for allowing these statements in as
17 evidence.

18 THE COURT: No, I understand.

19 MR. GILLIS: Oh.

20 THE COURT: That's -- okay. But you're not
21 relying on the agency exception.

22 MR. GILLIS: We're not, Your Honor.

1 THE COURT: Right. Right.

2 MR. GILLIS: We're relying upon

3 coconspirator and --

4 THE COURT: 801, coconspirator statements.

5 MR. GILLIS: -- and adoptive admissions and

6 then perhaps the effect on the listener. I can

7 speak to any of those if you --

8 THE COURT: No.

9 MR. GILLIS: -- like.

10 THE COURT: It's not necessary.

11 MR. GILLIS: Okay. With respect to the

12 Fourth Circuit, the assertion that the Fourth

13 Circuit has decided this question already, Your

14 Honor, that is not the case. The only case that

15 they cite for the proposition that -- that this --

16 the question decided by the Fifth and Sixth Circuit

17 is that it has not -- has been decided in the Fourth

18 but not in the Fifth and Sixth, is this in re grand

19 jury proceeding Number 5, Your Honor.

20 I would -- that -- that appeal, first of

21 all, involved multiple grounds for reversal,

22 including that the District Court failed to

1 undertake an in-camera review of attorney-client
2 documents, fact work product documents, as well as
3 opinion work product documents.

4 And as to at least two of those privileges,
5 the client clearly had standing to be on appeal.
6 The Court had no cause to examine the question of
7 whether as to the specific opinion work product at
8 issue, it had no occasion to get to that point
9 because it found that the Court below had not done
10 an adequate job of reviewing the documents in-camera
11 as it was required to do. So that is a key
12 distinction.

13 Also in that case, the attorney did appeal
14 and did assert his own opinion work product. And,
15 in fact, the Court took note of that in footnote 9
16 of its -- of its opinion and clearly it therefore
17 regarded that as significant.

18 And so the Fourth Circuit there found that
19 the District Court could not have established a
20 relationship between the documents and the crime
21 without an in-camera review of the documents, which
22 it did not do. Therefore, it remanded for that

1 purpose, Your Honor, for the District Court to
2 examine the documents and determine whether each
3 individually was subject either to the
4 attorney-client privilege or to the fact work
5 product privilege or to the opinion work product
6 documents. And so it -- it really had no occasion
7 to get that far in any reported holdings that --
8 that they claimed exist, simply did not come to pass
9 in that -- in that case.

10 And, in fact, I believe in that case,
11 the -- the Court strongly suggested that this
12 opinion work product in this case would not apply,
13 that they would follow the Fifth and Sixth -- the
14 Fifth and Sixth Circuits.

15 The entire opinion work product doctrine,
16 Your Honor, derives from the attorney's own mental
17 impressions and opinions and it is based entirely
18 upon that. And when a guilty client seeks to take
19 advantage of that, it just makes utterly no sense
20 and the Fourth Circuit has not come close to holding
21 that.

22 In fact, what they said was while the

1 attorney along with the client holds the fact work
2 product privilege, the discovery of facts furnished
3 to an attorney does not implicate the same concerns
4 as does invading the necessary privacy of an
5 attorney's opinion work product. It is -- all of
6 this, beginning with Hickman, is focused on the
7 attorney's right to her own impressions -- mental
8 impressions and opinions and to allow that to be
9 applied by the guilty client, where he's not allowed
10 to apply it in the attorney-client context, in a
11 more sacred context, as I've said.

12 THE COURT: I understand.

13 MR. GILLIS: Thank you, Your Honor. I'm
14 sure you do. Thank you very much.

15 THE COURT: Counsel, I'll give you the
16 last -- do you have anything else to say about
17 the --

18 MR. GIBBS: No, Judge.

19 THE COURT: All right.

20 MR. GIBBS: Just out of efficiency,
21 Mr. Gillis handled both of them.

22 THE COURT: All right. Great. I'll take

1 these under advisement again, get decisions on all
2 of these here just as soon as I can, which I hope
3 will be shortly. All right. And we'll see
4 everybody Monday at 2:00.

5 MR. GILLIS: Thank you, Your Honor.

6 THE COURT: All right. Thank you.

7 MR. GIBBS: Thank you, Judge.

8 MS. MITCHELL: Thank you, Your Honor.

9 MR. TYSSE: Thank you, Your Honor.

10 (Whereupon, the proceedings at 12:12 p.m.
11 were concluded.)
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1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

2 I, REBECCA MONROE, Court Reporter and
3 Notary Public in and for the Commonwealth of
4 Virginia at Large, and whose commission expires
5 August 31, 2021, do certify that the foregoing is a
6 true, correct, and full transcript of the
7 proceedings.

8 I further certify that I am neither related
9 to nor associated with any counsel or party to the
10 proceedings; nor otherwise interested in the event
11 thereof.

12

13

14



Notary

15

16

Rebecca Monroe

17

Notary Public

18

Commonwealth of Virginia at Large

19

Notary No. 7243327

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